Supreme Court, U.S.
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No. 01-1267

IN THE
SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY AKA
DANNY DEAN THOMAS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

Shisinday seeks a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals affirming his conviction for capital murder and resulting sentence of death.

STATEMENT OF THE CASE

I. Facts of the Crime

Shisinday was convicted of capital murder for having kidnaped and killed nineteen-year-old Sylvia Harrison in July of 1981. The facts of the offense are set out in detail in the opinion of the court below. Petitioner's Appendix A at 2-5.

II. Facts Relating to the Issues Presented

A. Testimony From the Prior Trial

The State's evidence included the testimony of Ernest Gilliam from Shisinday's prior trial. State's Exhibit 67, XVIII SF 98-101.[1] Admission of the prior testimony was necessary because Gilliam had died since the first trial. State's Exhibit 68. Gilliam identified the murder weapon, State's Exhibit 10, as a gun he had sold to Shisinday the same month that he killed Harrison. XVIII SF 99-100.

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[1] "SF" refers to the Statement of Facts, or compilation of trial testimony, and "Tr" refers to the transcript of pleadings, orders, and other documents filed in the case. Volume numbers precede and page numbers follow all record citations.

Defense counsel's cross-examination consisted of a single question, whether the gun had "one clip or two clips." XVIII SF 101.

Gilliam's testimony was cumulative of that of other witnesses. Harris County sheriff's deputy William Olive testified that on July 20, 1981, he recovered the murder weapon from Shisinday's car. XVIII SF 107, 111, 115-16. Martha Tarver also identified the gun as Shisinday's, XV SF 56, as did Doyle Peels, XV SF 97, and Ronald McHenry. XV SF 120. In addition, Shisinday gave a lengthy written confession in which he admitted owning the gun. State's Exhibit 40.

B. Shisinday's Insanity Defense

The trial court instructed the jury at the guilt-innocence phase that insanity was an affirmative defense to the charge of capital murder. 1A Tr 405. Shisinday raised no issue at trial of his inability to present that defense due to his trial demeanor.

C. The Texas Death Penalty Statute

The jury instructions at the punishment phase of trial followed Article 37.0711 of the Texas Code of Criminal Procedure. 1A Tr 117-25. The portions of the statute of which Shisinday complains provide that the jury must agree unanimously on answers to the special issues that would result in a death sentence and that at least ten jurors must agree on answers that would result in a life sentence. *Id.*, § 3(d)(1)(2), (f)(2). Petitioner's Appendix D at 4-5. During the jury's deliberations, Shisinday submitted a proposed instruction, which the trial court denied, that would have

informed the jurors that a hung jury would result in "an automatic life sentence." Petitioner's Appendix L.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are compelling reasons therefor. Shisinday advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II. The Trial Court Properly Admitted Testimony From Shisinday's Prior Trial.

Shisinday first complains that the State was allowed to present Gilliam's testimony from his prior trial. Petition at 13-18. Because his first conviction was overturned due to a violation of *Riggins v. Nevada,* 504 U.S. 127 (1992), he reasons, introduction of the Gilliam testimony from the first trial "again deprived [him] of all the rights recognized in *Riggins* . . . ." Petition at 14.

Shisinday's requested extension of *Riggins* finds no support in this Court's decisions or in notions of fundamental fairness that undergird a criminal defendant's right to a fair trial. *Riggins* holds only that a defendant who is medicated

at trial against his will is entitled to a new trial without being "required to demonstrate how the trial would have proceeded differently if he had not been given [the drug]." 504 U.S. at 137. Consequently, when Shisinday's first conviction was reversed, he obtained all the relief available under *Riggins,* which allows him only to "challenge his *conviction*." *Id.* at 139 (Kennedy, J., concurring in the judgment) (emphasis added). Shisinday does not, because he cannot, point to any portion of that decision that created a derivative right to bar the introduction of testimony at a subsequent proceeding that fully comports with *Riggins* and every other constitutional requirement for a fair trial.

Thus understood, Shisinday's submission is simply a garden-variety claim that certain evidence was wrongly admitted. As such, it warrants reversal only if "there is a reasonable probability that the improperly admitted evidence contributed to the conviction." *Schneble v. Florida,* 405 U.S. 427, 432 (1972), *quoted in Parker v. Randolph,* 442 U.S. 62, 80-81 (1979) (Blackmun, J., concurring in part and concurring in the judgment). Given the trial record, Shisinday cannot make this showing.

Apart from *Riggins*, the only potential constitutional violation that Shisinday identifies is an alleged denial of the right of confrontation. Petition at 15 n.4. The Confrontation Clause protects a criminal defendant in two ways: the right physically to face his accusers and the right of cross-examination. *Pennsylvania v. Ritchie,* 480 U.S. 39, 51 (1987); *Delaware v. Fensterer,* 474 U.S. 15, 18-19 (1985) (per curiam). The right of cross-examination includes the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability

of the witness." *Davis v. Alaska,* 415 U.S. 308, 318 (1974), *quoted in Pennsylvania v. Ritchie,* 480 U.S. at 54. While Shisinday offers self-serving speculation that his medication prevented him from assisting defense counsel during cross-examination of Gilliam, he makes no particularized showing that his confrontation rights were in any way curtailed. Indeed, given the limited nature and relative unimportance of Gilliam's testimony and that it was extensively corroborated by other evidence, it is difficult to conceive how the defense might have benefited from further cross-examination.

Moreover, assuming *arguendo* that Shisinday's confrontation rights were abridged, any error surely was harmless. Whether a confrontation violation is harmless turns on several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall,* 475 U.S. 673, 684 (1986). Here, the case against Shisinday, including his detailed confession, was strong. Further, Gilliam's brief testimony was of little consequence, as it concerned only the peripheral issue of how Shisinday obtained the murder weapon, as opposed to the core of the State's case -- the numerous acts of violence that Shisinday perpetrated on his victim.

Moreover, Gilliam's testimony was not contradicted and was bolstered by other evidence. Shisinday incorrectly asserts that "the Gilliam testimony served as the State's principal way of linking [him] to the gun." Petition at 8. In

fact, as noted above, numerous other witnesses gave similar testimony, including Harris County sheriff's deputy William Olive, XVIII SF 107, 111, 115-16; Martha Tarver, XV SF 56; Doyle Peels, XV SF 97; and Ronald McHenry. XV SF 120. Shisinday also confessed that the gun was his. State's Exhibit 40.[2] Thus, there is no substance to Shisinday's assertion that Gilliam's testimony "was of critical importance to the State's case." *Id.* Admission of that testimony, if error, was harmless beyond a reasonable doubt.[3]

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[2] Shisinday characterizes his confession as "extremely questionable." Petition at 7. In fact, it was "probably the most probative and damaging evidence that can be admitted against him." *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting). Moreover, the confession was held by the court below to be admissible, Petitioner's Appendix A at 16-17, a determination that Shisinday does not ask this Court to review.

[3] Shisinday also asserts that Gilliam's testimony was more important at his second trial because the State introduced DNA evidence that "demonstrated that blood from the victim was present on the gun . . . ." Petition at 8. Shisinday does not explain this statement, and it makes no sense. The DNA evidence aside, there never has been any question that State's Exhibit 10 was the murder weapon. The State's need to link the weapon to Shisinday (which it did through numerous witnesses) was not affected by introduction of the DNA evidence.

III. Shisinday's Presentation of an Insanity Defense Was Not Unfairly Impaired.

In a related claim, Shisinday argues that the *Riggins* violation at his first trial, coupled with the passage of time, somehow impaired his presentation of an insanity defense at the retrial. Petition at 19-23. Because his mental illness was in remission at the second trial, the argument goes, his "normal" trial demeanor did not support his assertion of insanity at the time of the offense.

This claim fails for several reasons. First, Shisinday's trial demeanor was, at most, highly attenuated evidence of his mental state at the time of the offense. Shisinday concedes as much, acknowledging that "*Drope* [*v. Missouri,* 420 U.S. 162 (1975)] affirms the significance of courtroom demeanor on the issue of competency to stand trial, but does not address the relevance of demeanor in the situations presented by [his] case." Petition at 20. He thus fails to show error in the holding of the court below that "Shisinday's competency at the time of his second trial has no bearing on whether he was insane at the time of the offense." Petitioner's Appendix A at 9. The cases that Shisinday cites as being in conflict, Petition at 21-22, do not show a true conflict of decisions, as none of them granted relief on the basis that he urges. The Texas cases that he cites as apparently being "at odds" with the decision in his case, Petition at 22 n.7, are even less persuasive, as they deal with the defendant's demeanor near the time of the offense, not at the time of trial. There is, in short, no conflict of authority on this point, much less a conflict sufficient to justify *certiorari* review. Moreover, even assuming the existence of a conflict, Shisinday cannot prevail on this claim

for the reasons discussed below. Where, as here, resolution of a conflict is irrelevant to the ultimate outcome of a case, review should be denied.

Second, assuming *arguendo* that Shisinday's demeanor was relevant to his claim of insanity, he fails to show that the State was responsible for his inability to present an "insane" demeanor at retrial. That his mental illness went into remission was due to the passage of time rather than state action. Indeed, for ten years–from the date of Shisinday's trial until *Riggins* was decided--there was no legal basis for overturning his conviction. During that time, the State had no reason for delay, and the passage of time actually inured to Shisinday's benefit.

Finally, even assuming relevance and state action, Shisinday nonetheless fails to show a federal constitutional violation in light of the great deal of evidence of insanity, including expert testimony, that he did present at trial. *See* Petition at 8 ("Petitioner presented extensive evidence of his mental illness at trial, in an effort to support his insanity defense during the guilt trial and his arguments in favor of mitigation during the sentencing phase of trial"). Given that evidence, which the jury obviously did not credit, it is fanciful to suggest that a different trial demeanor would have tipped the scales in favor of a finding of insanity. *See, e.g., Jermyn v. Horn,* 266 F.3d 257, 285 (3rd Cir. 2001) (trial counsel not ineffective in not presenting additional evidence of insanity, and state supreme court's "conclusion that Jermyn could not establish that he was prejudiced by his counsel's actions is not objectively unreasonable, given the wealth of evidence counsel actually presented concerning the nature of Jermyn's mental illness, its manifestations, and his

probable insanity at the time of the murder").

For the same reasons, Shisinday's changed demeanor did not affect the fundamental fairness of the punishment phase of trial. Numerous courts of appeals have held that the exclusion of mitigating evidence can be harmless. *E.g., Bryson v. Ward,* 187 F.3d 1193, 1205 (10th Cir. 1999). In addition to his evidence of mental illness, Shisinday also presented an array of mitigating evidence, including good behavior in jail and prison, XXII SF 45-58, 62-67, 79-87, XXIII SF 129-33, 136-37, 143-44; expert testimony that his I.Q. had risen and his anti-social traits had disappeared during his incarceration, XXII SF 93-104; expert testimony that his deprived childhood had caused his criminal behavior, XXII SF 97, XXIII SF 8-20; and extensive records documenting his mental illness and experience with mental health and school authorities. XXII SF 133-44. Given that his jury was not persuaded by that evidence, "no reasonable juror would have considered [his demeanor] sufficiently mitigating to warrant a penalty less than death." *Id.*

IV. The Texas Death Penalty Statute Is Constitutional.

Shisinday's final complaint is that the Texas statute, facially and as applied to him, is unconstitutional because it forbids a trial court from instructing the jury what would happen in the event of a hung jury on punishment. Petition at 23-29. This claim fails under *Jones v. United States,* 527 U.S. 373 (1999). There, in rejecting a similar challenge in a federal death penalty case, the Court noted it had "never suggested . . . that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process." *Id.* at 382. It is not error, therefore, to

refuse an instruction that informs the jury of the effect of an inability to agree, because "the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role–when deliberations break down and the jury is unable to produce a unanimous sentence recommendation." *Id.* "The jury's role was to deliberate and to attempt to reach a unanimous verdict. The fact that there was a statutorily defined default rule in case the jury could not agree does not change this fact." *Coe v. Bell,* 161 F.3d 320, 340 (6th Cir. 1998). Shisinday's claim is foreclosed by *Jones,* and he cannot show a conflict that might warrant *certiorari* review because the courts of appeals "are uniform in rejecting the argument that the Constitution requires an instruction as to the consequences of a jury's inability to agree." *Jones,* 527 U.S. at 382 n.6.

In citing *Romano v. Oklahoma,* 512 U.S. 1 (1994), for the proposition that his jury was misled, Petition at 26, Shisinday ignores the *Jones* Court's admonition that a jury not instructed as to deadlock consequences is "[i]n no way . . . misled" within the meaning of *Romano.* 527 U.S. at 382. Moreover, Shisinday's argument is just the opposite of that advanced by Romano, that certain evidence "impermissibly undermined the sentencing jury's sense of responsibility . . . ." 512 U.S. at 9. Instead, Shisinday contends that his jury should have been given an instruction that"would have been an open invitation for the jury to avoid its responsibility and to disagree." *Justus v. Virginia,* 266 S.E.2d 87, 92 (Va. 1980), *quoted in Jones,* 527 U.S. at 384.

Further, Shisinday's attempts to distinguish *Jones,* Petition at 27-29, are unavailing. First, they are irrelevant, as

the *Jones* Court's holding that a deadlock instruction was not constitutionally mandated did not turn on the particular facts of that case. Moreover, the instructions that Shisinday's jury was given were accurate statements of the law, and thus "the jury was not affirmatively misled regarding its role in the deliberative process . . . ." *Romano,* 512 U.S. at 9. The instruction that ten jurors must agree on answers to support a life sentence correctly expressed Texas law, and its accuracy was not diminished simply because the jurors were not further instructed on an altogether different matter that was not their concern: what the law required in the event they could not agree.

Shisinday also complains that, unlike the petitioner's submission in *Jones,* the Texas statute "prohibits the trial court from *ever* instructing the jury as to the consequences of a failure to agree." Petition at 26-27 (original emphasis). This distinction is a *non sequitur,* as the lack of a constitutional basis for such an instruction confirms the validity of the Texas rule.

Equally meaningless is Shisinday's assertion that the Texas statute "appears to operate in the way it does by virtue of a mistake, not by design." Petition at 27. First, exercising certiorari jurisdiction to delve into this unimportant state-law question would be an unwise expenditure of the Court's resources. Further, assuming *arguendo* that the legislative history of the statute supports Shisinday's position, he nonetheless fails to show that the statute operates unconstitutionally, as discussed above.

Finally, accepting *arguendo* Shisinday's argument that he was prejudiced by the absence of a deadlock-

consequences instruction, Petition at 28-29, prejudice alone is insufficient to justify Supreme Court review. Obviously, every petitioner before this Court suffered some degree of prejudice in the courts below. Shisinday was not unfairly prejudiced, however, because under *Jones,* his "substantive argument is meritless." *Alexander v. Johnson,* 211 F.3d 895, 897 n.5 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, the State respectfully requests that Shisinday's petition for writ of certiorari be denied.

Respectfully submitted,

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